CRIMINAL YEAR SEMINAR

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Webinar

Constitutional Law & DUI Update

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2020–2021 DUI and Constitutional Law

Presented by

The Hon. Crane McClennen

Retired Judge of the Maricopa County Superior Court

1

28–1381(A)(3) Driving or actual physical control—Any illicit drug in the person's body.

Clark, 249 Ariz. 528, 472 P.3d 544 (Ct. App. 2020): Clark was charged with aggravated driving while impaired to slightest degree, and aggravated driving with drug in his body; state's expert testified Clark had 3.6 nanograms per milliliter of marijuana metabolite THC in his blood; Clark raised defense in the AMMA for a defendant to show medical marijuana authorization and that the concentration of marijuana was insufficient to cause impairment; jurors found Clark not guilty of driving while impaired to the slightest degree and guilty of driving with a drug in his body; Clark contended the not guilty of impairment charge showed he had established the AMMA defense and thus there was insufficient evidence to support driving with a drug in his body charge.

.060 To prove a defendant guilty under § 28–1381(A)(3), the state must only prove the presence of a drug or metabolite in the person's body and does not have to prove the person was in fact impaired, thus the provision of the AMMA, A.R.S. § 36–2802(D), which provides immunity to being "under the influence of marijuana," does not immunize a medical marijuana cardholder from prosecution under § 28–1381(A)(3), but instead affords an affirmative defense if the cardholder shows the marijuana or its metabolite was in a concentration insufficient to cause impairment.

¶¶ 20–26 Court held the verdicts could be interpreted as jurors' conclusion that the state had not proved the impairment charges beyond reasonable doubt, but that Clark had not established the AMMA defense by a preponderance of the evidence; and to the extent the verdicts could be seen as inconsistent, Arizona allows inconsistent verdicts.

2

28–1594. Authority to detain persons.

Devlin v. Browning, 249 Ariz. 143, 467 P.3d 268 (Ct. App. 2020): Officer observed car traveling over speed limit and stopped car; upon contacting driver (Devlin), officer saw he had bloodshot, watery eyes and smelled the odor of alcohol; officer asked Devlin if he had been drinking, and Devlin acknowledged he had; Devlin handed officer his license without difficulty, did not appear confused, answered questions appropriately, and did not have "problems with his speech"; officer then conducted "one pass" nystagmus test to determine whether cause of Devlin's bloodshot watery eyes might be due to fatigue rather than alcohol consumption and observed a lack of smooth pursuit in Devlin's left eye; Devlin noted that consuming alcohol and driving is not crime in itself, and that statutes prohibit driving while "impaired to the slightest degree" or with blood alcohol content (BAC) of .08 or more, and contended officer must base reasonable suspicion on some indicia of impairment or a BAC over the legal limit.

.010 A peace officer or duly authorized agent of a traffic enforcement agency may stop and detain a person as is reasonably necessary to investigate an actual or suspected Title 28 violation and to serve a copy of the traffic complaint for an alleged civil or criminal Title 28 violation.

¶¶ 2, 9–15 Court held time of night (after 2:00 a.m.) and area involved, which officer testified was known artery for impaired drivers leaving nearby "alcohol establishments," car traveling 10 miles per hour over the speed limit, his observations that Devlin's eyes were bloodshot and watery, odor of alcohol emanating from car, Devlin's admission to consuming alcohol not long before driving, and indication of nystagmus in one of Devlin's eyes, all taken together gave rise to reasonable suspicion.

¶¶ 17–18 Court noted officer may have reasonable suspicion that driver is in violation of § 28–1381(A)(2) even lacking observations of any signs of physical impairment entirely because that statute requires only that the defendant drove vehicle, had an alcohol concentration of .08 or more within 2 hours of driving, and concentration resulted from alcohol consumed either before or while driving, and concluded Devlin's speeding 10 miles per hour over the posted limit, odor of alcohol emanating from vehicle, Devlin's admission that he had been drinking, and the 2:00 a.m. time when many area alcohol-serving establishments had just closed, might arguably suffice to warrant further investigation, and that officer had significantly more to go on, including, Devlin's watery and bloodshot eyes and tell-tale clue from initial nystagmus indication before being asked to exit his car, all added to totality of circumstances justifying officer's reasonable suspicion of impairment.

3

U.S. Const. amend. 4 Search and seizure—Length of detention.

Raffaele, 249 Ariz. 474, 471 P.3d 685 (Ct. App. 2020): officer saw driver of vehicle (Raffaele) commit lane change violation, so officer stopped him and said he was issuing warning; Raffaele gave officer permission to look inside vehicle for rental documents, and when officer did, he smelled marijuana; officer issued warning to Raffaele and continued to ask him about his trip to California; Raffaele said he rented the vehicle because his car was being repaired and that vehicle was rented in his mother's name because he did not have credit card; officer asked Raffaele when he last used marijuana, both generally and in vehicle, and he said he last smoked 2 days earlier in vehicle and presented his AMMA medical marijuana card; officer explained that, although Raffaele had medical marijuana card, vehicle would still need to be searched to ensure that any marijuana in vehicle was within the regulated amount; short time later, Raffaele admitted he was transporting about 7 pounds of marijuana from California dispensary; given this admission, officer arrested Raffaele searched vehicle, and found 10 pounds of marijuana in trunk. Raffaele contended his prolonged traffic stop was not supported by a reasonable suspicion of criminal activity after he presented his medical marijuana card.

us.a4.ss.ld.020 For a traffic stop, the duration of the officer's inquiries must extend only as long as necessary to effectuate the purpose of the traffic stop or any related safety concerns; after the original purpose of the stop has been resolved, the officer must permit the driver to leave without further delay or questioning unless: (1) during the traffic stop the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity; or (2) the encounter between the officer and the driver ceases to be a detention, but becomes consensual; if a driver agrees to answer additional questions after the conclusion of the traffic stop, he has not been "seized" under the Fourth Amendment and the consensual encounter may extend as long as a reasonable person would feel free to disregard the police and go about his or her business.

¶¶ 16–21 Court held that, based on totality of circumstances, officer had reasonable suspicion that criminal activity was afoot despite Raffaele's presenting his medical marijuana card.

4

U.S. Const. amend. 4 Search and seizure—Search of cell phone.

Smith, 250 Ariz. 69, 475 P.3d 558 (Nov. 4, 2020): After Smith was indicted for first-degree murder and child abuse, the state obtained from the Initial Appearance Court a court order pursuant to A.R.S. § 13–3016 for Smith's historical cell site location information (CSLI), which revealed Smith was near the location of the murder near the time of the murder. Smith contended the trial court erred in denying his motion to suppress his CSLI. On appeal, the state conceded that under *Carpenter v. U.S.*, a search warrant was required to obtain Smith's CSLI, but argued that, because the CSLI Order was the functional equivalent of a warrant, it complied with *Carpenter.*

us.a4.ss.cp.030 The state must obtain a search warrant based on probable cause to obtain historical cell site location information (CSLI).

¶¶ 16–28 Court held the order was based on reasonable grounds and not probable cause, and therefore was not functional equivalent of a warrant; court applied the good faith exception and upheld the search.

5

Ariz. Const. art. 2, sec. 8. Right to privacy.

Smith argued the Arizona Constitution independently required suppression.

az.2.8.020 Except for cases involving homes, Arizona courts have not yet held Article 2, section 8, grants broader protections against search and seizure than those available under the federal constitution.

¶¶ 32–33 Court held obtaining CSLI information did not involve warrantless entry into a person's home, and even if Arizona Constitution provided greater protection, the good-faith exception applied.

6

Conner, 249 Ariz. 121, 467 P.3d 246 (Ct. App. Jun. 23, 2020): State applied for and obtained court order for defendant's CSLI; Conner contended police violated his Fourth Amendment rights when they obtained his CSLI with court order instead of warrant; state conceded the order was not search warrant.

us.a4.ss.cp.030 The state must obtain a search warrant based on probable cause to obtain historical cell site location information (CSLI).

¶¶ 13–24 Court noted judge issued order after reviewing detective's affidavit, which set forth probable cause, and that order was based on a probable cause finding and identified places and items to be searched and seized; court thus held Conner failed to show how order was substantively different from search warrant. ***Smith*** declined to follow reasoning in ***Conner. Smith*** at ¶¶ 21–22.

7

U.S. Const. amend. 4 Search and seizure—Search for Internet Protocol address and Internet Service Provider subscriber information.

Mixton, 250 Ariz. 282, 478 P.3d 1227 (2021): Undercover detective posted advertisement on online forum seeking users interested in child pornography; person with username "tabooin520" contacted detective and asked to be added to group chat on messaging application called "Kik"; once added, tabooin520 sent images and videos of child pornography to group chat and to detective; at detective request, federal agents served a federal administrative subpoena on Kik to obtain tabooin520's IP address; Kik provided IP address to detective, who used publicly available databases to determine Cox Communications was ISP for IP address; federal agents then served another federal administrative subpoena on Cox for subscriber information associated with IP address; Cox disclosed subscriber information—name, street address, and phone number—of William Mixton; detective used this information to obtain and execute search warrant on Mixton's residence, and seized cell phone, external hard drive, laptop, and desktop computer; subsequent search of these devices revealed photos and videos of child pornography, as well as messages, photos, and videos Mixton sent to detective under username "tabooin520"; Mixton was convicted of 20 counts of sexual exploitation of minor under 15 years of age; Mixton contended law enforcement officials were required to secure a judicially-authorized search warrant or order to obtain either (1) a user's Internet Protocol ("IP") address or (2) subscriber information the user voluntarily provides to an Internet Service Provider ("ISP") as a condition or attribute of service.

us.a4.ss.ip.010 Because a person voluntarily provides the person's Internet Protocol (IP) address and subscriber information to an Internet Service Provider (ISP), this information falls within the third party doctrine and thus is not protected by the Fourth Amendment, so a search warrant is not required, and law enforcement officials may obtain a person's IP address and ISP subscriber information with a lawful federal administrative subpoena.

¶¶ 14–21 Court held trial court correctly denied Mixton's motion to suppress.

8

Ariz. Const. art. 2, sec. 8. Right to privacy.

Mixton contended officers' conduct violated his Arizona right to privacy.

az.2.8.020 Except for cases involving homes, Arizona courts have not yet held Article 2, section 8, grants broader protections against search and seizure than those available under the federal constitution.

¶¶ 27–63 Court looked to federal cases and concluded internet user has no actual (subjective) expectation of privacy in IP address or personally identifying information he or she submitted to the ISP to subscribe to its service, and thus concluded search did not violated Arizona Constitution.

9

U.S. Const. amend. 4 Search and seizure—Search of a person on probation or parole.

Lietzau, 248 Ariz. 576, 463 P.3d 200, ¶¶ 16–30 (2020): Lietzau was placed on probation with written conditions that he would submit to search and seizure of person and property by Adult Probation Department without a search warrant; 4 months later, woman told Lietzau's probation officer she believed he was having inappropriate relationship with her 13-year-old daughter (S.E.); few weeks later, probation officer arrested Lietzau for violating conditions of his probation based on his failure to provide access to his residence, participate in counseling programs, comply with drug testing, and perform community restitution; on way to jail, officer examined Lietzau's cell phone and saw numerous text messages between Lietzau and S.E.; probation department reported these findings to police department, and detective then obtained search warrant and discovered incriminating photos and text messages in phone; Lietzau was subsequently indicted on charges of sexual conduct with minor; Lietzau contended the warrantless examination of his cell phone violated his Fourth Amendment rights.

us.a4.ss.pop.010 As long as the conditions of release authorize such a search, a warrantless search of a person on **parole** may be conducted even without reasonable suspicion; for a person on **probation,** the search must be reasonable under the totality of the circumstances, which requires that the search be conducted by a probation officer in a proper manner and for a proper purpose in determining whether the probationer is complying with the probation obligations.

us.a4.ss.cp.040 Arizona's standard conditions of probation permit warrantless searches of a probationer's "property," and the plain meaning of "property" includes a cell phone.

¶¶ 16–30 Court held that, under totality of circumstances, including Lietzau's significantly diminished privacy rights as probationer, his acceptance of search conditions when he agreed to probation, which included his cell phone, probation department's well-grounded suspicion that Lietzau might be involved in serious offense with adolescent child, and well-known use of cell phones as aid in committing sexual offenses against children, officer's search of Lietzau's cell phone was reasonable. Further, conditions of probation permitting warrantless searches of a probationer's "property" applied to cell phones. Court thus held trial court abused its discretion in granting defendant's motion to suppress.

10

U.S. Const. amend. 4 Search and seizure—Challenge to a warrant.

Lapan, 249 Ariz. 540, 472 P.3d 1103, ¶¶ 8–24 (Ct. App. 2020): Lapan contended that, in the affidavit, the detective downplayed strength of and skewed Lapan's alibi, omitted "crucial information" about another possible suspect, and omitted Lapan's co-workers' statements that corroborated Lapan's description of source of his injuries, and that high number of misstatements made Lapan look more responsible than available information suggested and showed detective's mental state while omitting information in affidavit was less than reckless and more likely intentional.

us.a4.ss.cw.010 A defendant may challenge a search warrant based on false or incomplete information, and if the defendant makes a substantial preliminary showing (1) that the affiant knowingly, intentionally, or with a reckless disregard for the truth, included a false statement in the affidavit, and (2) the false statement was necessary to the finding of probable cause, the defendant is entitled to a (*Franks*) hearing.

¶¶ 8–24 Court held Lapan did not make substantial preliminary showing that false statements and material omissions were made, at minimum, with reckless disregard for truth, thus he did not establish first prong and therefore was not entitled to evidentiary hearing, and that, even if that material were removed from affidavit, there remained sufficient information to establish probable cause.

11

U.S. Const. amend. 5 Double jeopardy.

Nunn, 250 Ariz. 366, 480 P.3d 109 (Ct. App. 2020): Nunn was an inmate at the state prison and was found in possession of an item containing three chemicals found in synthetic marijuana and classified as dangerous drugs. He was convicted of promoting prison contraband and possession of a dangerous drug, and contended those convictions violated double jeopardy.

us.a5.dj.090 A conviction of both a greater offense and a lesser-included offense violates double jeopardy.

¶¶ 11–16 Court concluded that, for both offenses, the person must only knowingly possess the item and does not have to know the item is prohibited; and further concluded possession of a dangerous drug is a lesser-included offense of promoting prison contraband, thus convictions for both offenses violated double jeopardy.

12

U.S. Const. amend. 5 Double jeopardy—Collateral estoppel and res judicata.

Cruz, 249 Ariz. 596, 473 P.3d 725 (Ct. App. 2020): during Cruz's 2009 trial on sexual misconduct and kidnapping charges, he escaped from custody; Cruz was found guilty *in absentia,* but sentencing could not occur in his absence; after Cruz was arrested years later, he was charged and tried for escape; he contended he was not the person who had escaped from custody, and jurors found him not guilty; defendant then argued the acquittal in the escape case collaterally estopped state from trying to prove his identity at sentencing in sexual assault case.

us.a5.dj.ce&rj.020 Collateral estoppel precludes the state from proceeding in a subsequent action if (1) the same parties were involved in both actions, (2) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue involved, (3) the same issue of ultimate fact is to be litigated in the subsequent proceeding as was determined in the prior proceeding, (4) the same burden of proof would apply in both proceedings, and (5) the previous judgment is valid and final.

¶¶ 8–14 Court held defendant was unable to explain how events occurring after finding of guilt but before sentencing could collaterally estop the state from proving defendant's identity at sentencing, and even assuming collateral estoppel could apply to this unusual fact pattern, defendant did not show that the issues at stake in the escape case and sentencing proceeding in sexual assault case were "precisely the same."

13

U.S. Const. amend. 14	**Due process**	**us.a14.dp.ev.030**
Ariz. Const. art. 2, sec. 2.1(A)(5).	**Victim's rights**	**az.2.2.1.a.5.080**
Ariz. Crim. Code § 13–4062(4)	**Physician-patient privilege**	**.020**
Arizona Crim. Rules Rule 15.1(g)	**Disclosure by court order**	**15.1.g.040**
Ariz. Rules Evid. Rule 501	**Right to Information**	**501.05.020**

For information not subject to *Brady,* the physician-patient privilege does not yield to the request of a criminal defendant for information merely because that information may be helpful to the defendant's defense; to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a **[reasonable possibility] [substantial probability]** that the protected records contain information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial.

State ex rel. Romley v. Superior Ct. (Roper), 172 Ariz. 232, 836 P.2d 445 (Ct. App. 1992): Defendant wife was charged with aggravated assault on husband; Court upheld trial court's order for *in camera* review of husband's medical records. Pages 238 & 451: In *U.S. v. Bagley,* the Supreme Court held that evidence is material if there is a **reasonable probability** that its disclosure would have altered the result at trial.

Connor, 215 Ariz. 553, 161 P.3d 596 (Ct. App. 2007): Connor was charged with killing the victim; Court upheld trial court's denial of Connor's request for production of the victim's medical records; ¶ 10: **reasonable possibility.**

Sarullo, 219 Ariz. 431, 199 P.3d 686 (Ct. App. 2008): Sarullo was charged with aggravated assault on girlfriend; Court upheld trial court's denial of Sarullo's request for production of the victim's medical/counseling records; ¶ 20: **reasonable possibility.**

Kellywood, 246 Ariz. 45, 433 P.3d 1205, ¶¶ 7–10 (Ct. App. 2018): Kellywood was charged with sexual conduct with adopted daughter; Court upheld trial court's denial of Kellywood's request for production of the victim's medical/counseling records; ¶ 8: **reasonable possibility;** ¶ 30: Dissent states majority is essentially requiring showing of **substantial probability.**

14

R.S. v. Thompson (Vanders), 247 Ariz. 575, 454 P.3d 1010, ¶¶ 9–28 (Ct. App. Nov. 21, 2019): (Vanders was charged with killing his girlfriend; trial court ordered hospital to disclose deceased victim's privileged mental health records for *in camera* review; court held Vanders did not establish **substantial probability** that the protected records contained information critical to an element of the charge or defense, or that their unavailability would result in a fundamentally unfair trial, thus trial court erred by granting *in camera* review. **Rev. granted 8/25/2020; O.A. 11/19/2020**

Dunbar, 249 Ariz. 37, 465 P.3d 527, ¶¶ 23–29 (Ct. App. Apr. 29, 2020): (Dunbar was charged with attempted murder of his ex-girlfriend; Dunbar sought victim's medical records from Pennsylvania, Maryland, and Arizona; court held Dunbar did not provide a sufficiently specific basis for requiring the victim to produce her medical records and thus failed to establish a **reasonable possibility** that the protected records contained critical information. **Rev. denied 12/15/2020.**

Fox-Embrey v. Neal (Main), 249 Ariz. 162, 467 P.3d 1102, ¶¶ 17–63 (Ct. App. Jun. 4, 2020): (Main was charged with murder and child abuse of her adopted children; Main sought medical and therapeutic records in DCS file; court concluded Main sustained her burden of establishing a **reasonable possibility** that the protected records contained critical information, thus showing she was entitled to *in camera* review of records. **Rev. continued 2/02/2021.**

15

U.S. Const. amend. 14 Due process—Identification procedures.

Smith, 250 Ariz. 69, 475 P.3d 558 (2020): Smith was convicted of first-degree murder of K.L. and child abuse of K.S. (daughter of K.L. and Smith); the day after the killing and attempted killing, detective Udd showed a photograph of Smith to K.L.'s roommate Jones; Jones said "That's the baby's daddy"; Jones also told Udd that K.L. had shown her pictures of Smith on Facebook and had identified him to her as K.S.'s father; additionally, Jones said that Smith was at the apartment the day of the murder. Smith contended the trial court violated the Due Process Clause by admitting Jones's pretrial identification of Smith because it was unduly suggestive and unreliable.

us.a14.dp.id.060 To establish a due process violation, a defendant must establish that the identification is not otherwise reliable, which will depend on (1) the witness's opportunity to view the person, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.

¶¶ 44–61 State conceded that the use of a single photograph was inherently suggestive; court concluded Jones's identification of Smith was reliable because: (1) Jones was able to see Smith, tried to look at him entire time, and saw him clearly; (2) her attention was directed at Smith when he was in the apartment; (3) she never provided description of defendant before officer showed her the photograph; (4) she was confident when she identified Smith; and (5) she identified Smith the day after seeing him.

16

Ariz. Const. art. 2, sec. 2.1(C). Victim's rights—Definition of "victim."

Bolivar, 250 Ariz. 213, 477 P.3d 672 (Ct. App. 2020): Bolivar contended the trial court abused its discretion in denying his motion to preclude state and witnesses from referring to "Becca" as "victim."

az.2.2.1.c.140 The constitutional protections afforded a crime victim do not mandate that a specific term be used in referring to the victim during court proceedings; instead, the trial court retains discretion to address—on a case-by-case basis—whether using a particular term to refer to a victim violates the victim's right to be treated with respect and dignity.

¶¶ 5–14 Court held *Z.W./Foster* did not establish that the term "victim" is inappropriate when the defendant disputes whether the crime occurred; and that there was no authority to support Bolivar's argument that the term "victim" is prohibited when state's key evidence is the testimony of the alleged victim; court further noted Becca's brother and mother also gave evidence supporting the charged offenses; and finally trial court's instructions would have rendered any error harmless.

17

Article 6, section 27. Comment on the evidence.

Bolivar contended the trial court's use of term "victim" to describe "Becca" constituted an improper comment on the evidence.

az.6.27.030 In order for a trial court's statement to be considered a comment on the evidence, the statement must express an opinion of what the evidence proves.

¶¶ 15–17 Court held that, because jury instructions, taken as whole, clearly established the burden of proof remained on state and that defendant was presumed innocent until proved guilty, the use of the term "victim" by trial court was not error.

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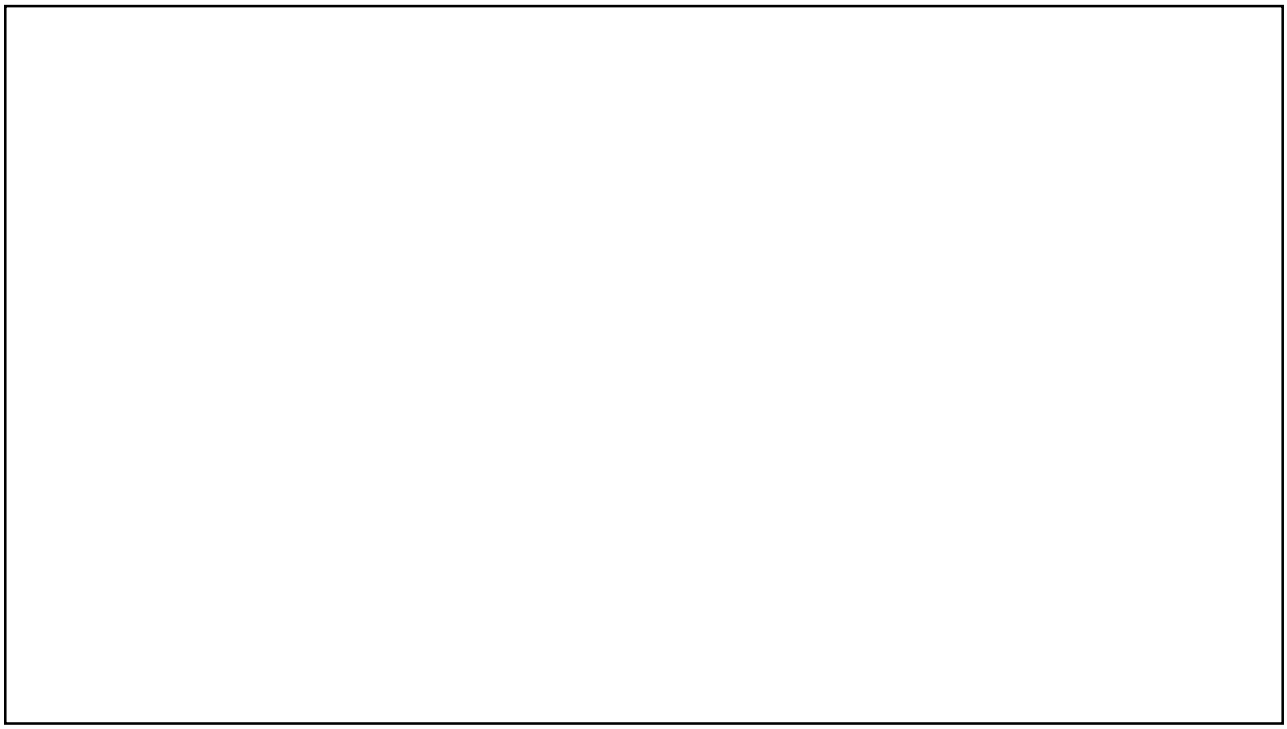

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